IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-6520

KINNEY KINMON LAU, a Minor by and through MRS. KAM WAI LAU, his Guardian ad Litem, *et al.*,

Petitioners,

—v.—

ALAN H. NICHOLS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC., IN SUPPORT OF PETITIONERS

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Introduction

Interest of Amicus Curiae

The Puerto Rican Legal Defense & Education Fund, Inc. (the "PRLDEF") is a privately funded, not-for-profit, New York corporation organized in 1972. Its mandate includes conducting litigation concerning issues which affect the Puerto Rican community as a whole. In that connection, the PRLDEF has commenced and participated in lawsuits involving voting rights, public assistance, migrant labor, employment discrimination, and the administration

of criminal justice. In addition, the PRLDEF has devoted a substantial amount of its resources to the educational problems which Puerto Rican children are compelled to face. In that context, the PRLDEF has filed *Aspira of New York* v. *Board of Education of the City of New York*, 72 Civ. 4002 (S.D.N.Y. Sept. 20, 1972) charging officials of the New York City public school system with violations of the rights of Puerto Rican school children to an equal educational opportunity and due process of law. Many of the issues raised by the petitioners herein are similar, if not identical, to the issues raised by the plaintiffs in *Aspira*. A decision on the merits in the instant case may significantly affect the outcome of *Aspira*. Accordingly, Amicus Curiae submits this brief urging reversal of the judgment of the Court of Appeals in *Lau* v. *Nichols*, 472 F.2d 909 (9th Cir. 1973).[1]

Aspira—A Description

Aspira was instituted by the filing of a summons and complaint on September 20, 1972. The action is brought pursuant to 42 U.S.C. §1983 to prevent the deprivation under color of law of rights protected by the Constitution of the United States, in particular, the Fourteenth Amendment thereto, and pursuant to 42 U.S.C. §2000d.

The named plaintiffs, consisting of Puerto Rican children and their parents, as well as Aspira of New York, Inc. and Aspira of America, Inc.,[2] brought the action in-

[1] Written consents for the filing of this Amicus Curiae Brief were obtained from attorneys for petitioners and respondents and filed with the Court on July 19, 1973.

[2] Aspira of New York, Inc., and Aspira of America, Inc. are not-for-profit New York corporations primarily concerned with the education of Puerto Rican students. The latter corporation is an affiliate of the former.

dividually and on behalf of a class comprised of approximately 182,000 Puerto Rican and other Spanish speaking children. These plaintiffs attend the public schools of the City of New York, and read, write, speak and comprehend English with substantial difficulty or not at all. They are receiving either no or inadequate educational services intended to take into account their linguistic needs.

The defendants consist of the Board of Education of the City of New York and its members, the Chancellor of the City School District of the City of New York and officials of various local school boards.

The complaint alleges that defendants fail to teach the non-English speaking plaintiffs the language of instruction which is English, and fail to teach them in the only language they understand which is Spanish. As a result, plaintiffs are denied an equal educational opportunity as compared to English speaking students for whom the New York City educational system is almost exclusively tailored. Plaintiffs further charge that the unequal treatment to which they are subjected is based on language, which is inextricably a part of their ethnicity and national origin. Thus, the unequal treatment is invidiously discriminatory. Finally, plaintiffs claim that the consequences of this treatment are educationally devastating and have resulted in lower reading scores, inferior mathematical performance, lower high school graduation and college admission rates, and higher drop out rates, for Puerto Rican youngsters as compared to Anglo-American or Black youngsters.

Aspira and Lau—The Common Issues

On November 15, 1972, the defendants in *Aspira* filed a motion to dismiss the complaint pursuant to Rule 12 of

the Federal Rules of Civil Procedure on the grounds that plaintiffs, *inter alia*, failed to state a claim upon which relief may be granted. On January 23, 1973 the Court denied all aspects of that motion. Several of the issues raised in the motion to dismiss are identical to the issues discussed by the District Court and Court of Appeals in *Lau*.

Stripped to their essentials, *Lau* and *Aspira* present the same threshold question: whether children of one ethnic or national origin group, who do not understand the language of instruction, receive an equal educational opportunity as compared to children of another ethnic or national origin group who do understand that language. For the non-English speaking Puerto Rican children in New York City, as for the non-English speaking Asian-American children in San Francisco, the question has been answered. As defendants in *Aspira* have testified: " . . . if the youngster is a non-English speaking youngster and . . . the educational offerings are in English, . . . he is being denied some of the advantages that the English-speaking youngster has."[3] The Court in *Aspira*, in denying a motion to dismiss, recognized that "effective equality" is not a simple concept achieved through the application of mechanical formulae. The Court (per Frankel, J.) stated at 58 F.R.D. 62, 63 (S.D.N.Y. 1973):

> Despite the perceptions of Anatole France and others, our laws against stealing bread and sleeping in public places continue to apply equally to rich and poor alike, indifferently producing their unequal consequences. We live in a time, however, of unsettling

[3] Deposition of Dr. Harvey B. Scribner, Former Chancellor of the City School District of the City of New York. May 9, 1973. Transcript p. 56.

questions about settled dogma. Among the unevenly developing results has been a growing principle that at least in respect of cherished human interests—as, for example, the unattained ideal of equal justice for rich and poor, *Douglas* v. *California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed.2d 811 (1963); *Griffin* v. *Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), the right to vote regardless of poverty, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed.2d 169 (1963), and the right to be free from even unintended disadvantages at governmental hands because of race or origin, *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1170, 1177 (2d Cir. 1972); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920, 931 (2d Cir. 1968)—the notion that sharply disparate people are legally fungible cannot survive the constitutional quest for genuine and effective equality.

However, the Court of Appeals in *Lau* avoids translating the educational deprivation suffered by non-English speakers into constitutional dimensions because: "Under the facts of this case, appellees' responsibility to appellants under the Equal Protection Clause extends no further than to provide them with the same facilities, textbooks, teachers, and curriculum as is provided to other children in the district." *Lau* v. *Nichols*, *supra* at 916. The educational by-product of this restrictive constitutional view is to continue to sanction a system in which members of an identifiable national origin or ethnic group are compelled to exist in a school environment where they are not educated. Such a system is not only dysfunctional, it is irrational. Simply put, a student who does not understand his teacher or his books or his classmates does not learn. And, a system that

is constructed in a manner which ignores a group of children of a particular national origin or ethnic group while it caters to another is antithetical to the notion of equal protection.

Accordingly, Amicus Curiae submits that the Court of Appeals in *Lau* erred in holding that the presence of past segregation is a condition precedent to a violation of petitioners' present right to an equal educational opportunity. Amicus Curiae further submits that exculpating respondents from causing petitioners' "language deficiency" cannot justify respondents circumventing their constitutional responsibility. Whether or not respondents caused petitioners' initial difficulty with understanding and speaking English is not relevant to the crucial issue raised by the present case. This issue is the constitutionality of constructing and maintaining an educational system, the effect of which is to burden a group of children on the basis of their national origin or ethnicity.

The Educational Impact

The disparity in treatment and the difference in result of the education of English speakers as opposed to non-English speakers is sufficiently blatant. A statistical analysis is not needed to demonstrate the discriminatory nature of the educational scheme established by San Francisco and New York.

Nevertheless, although discovery is not complete in *Aspira,* defendants have produced statistics indicating that Puerto Rican children in the New York City public school system are performing below their Anglo-American and Black counterparts and are receiving an inferior education

because, in large part, they cannot understand the language of instruction.

The failure to take into account the linguistic characteristics of Puerto Rican children is particularly critical for a city such as New York which contains more than half of the nearly one and one half million Puerto Ricans residing in the continental United States.[4] As a result of this large New York concentration of Puerto Ricans and other Spanish-surnamed persons, approximately 27 percent of the New York City public school children are of Hispanic extraction.[5] In approximately 72.1 percent of the homes from which these children come, Spanish is the language normally spoken by the parents and other family members.[6] As expected, the language difficulty of the Puerto Rican and other Hispanic student population is acute. According to statistics supplied by the Board of Education of the City of New York as of October 26, 1971, over 100,000 of these children have some language difficulty. More than one-third of that number have been characterized by the Board of Education, itself, as having "severe language difficulty."[7]

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[4] United States Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: November 1969*, February 1971, p. 20. United States Department of Commerce, Bureau of the Census, *General Social and Economic Characteristics*, May 1972, p. 295.

[5] Board of Education of the City of New York, "Special Census as of October 29, 1971."

[6] United States Department of Commerce, Bureau of the Census, *Persons of Spanish Origin in the United States: November 1969*, February 1971, p. 20.

[7] Board of Education of the City of New York, "Language Survey as of October 29, 1971, Ability to Speak English by School Level by District," June 5, 1972, p. 206.

The large number of Puerto Rican children with language difficulty in New York City, coupled with the paucity of programs tailored to their linguistic needs results in Puerto Rican children receiving shockingly low reading scores on standardized reading tests given throughout New York City. Thus, of the sixty-six (66) elementary schools in New York City containing 85 percent or more students who read below grade level, almost two-thirds of these schools have a student population containing more than 50 percent Puerto Rican children. In those elementary schools where more than 90 percent of the student body reads below grade level, all but two of these schools contain over 50 percent Puerto Rican students and more than half of these schools have a student population containing over 71.2 percent Puerto Rican student population.[8] Viewed on a larger scale, the five New York City School districts which have the lowest rank in reading scores as of 1972 include the four districts with the heaviest concentration of Puerto Rican students.[9]

The above statistics do not, of course, include the thousands upon thousands of Puerto Rican students whose reading levels are not tested because their English speaking difficulty is so severe as to render any such test meaningless.[10]

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[8] Bureau of Educational Research, Board of Education of the City of New York, "Ranking of Schools by Reading Achievement, October, 1972," p. 6; "Special Census as of October 29, 1971."

[9] Bureau of Educational Research, Board of Education of the City of New York, *1971-72 City Wide Reading Tests Results*, p. 22; "Special Census as of October 29, 1971."

[10] Defendants in *Aspira* have admitted ". . . the allegations that defendants annually administer the Metropolitan Reading Achievement Tests throughout the City of New York and that approxi-

In sum, to dismiss petitioners and hold that they receive the same educational opportunity as English speakers sidesteps the educational as well as the constitutional realities confronting children who cannot understand English.

ARGUMENT

POINT I

Respondents' Treatment of Petitioners Violates the Equal Protection Clause.

By failing to take reasonable steps to teach petitioners English, respondents have erected a classification between school children who receive instruction in a language they understand and those who do not, and such classification is based upon the prime national origin characteristic of Asian-Americans—their language. Accordingly, the educational curricula in San Francisco invidiously discriminates against petitioners, and in that respect it should be struck down. *Korematsu* v. *United States,* 323 U.S. 214 (1944).

Instructing all children including petitioners in English, while failing to take reasonable steps to teach petitioners to understand and speak English does not fulfill the notion of even-handedness. Providing all children including petitioners with the same English written books, while failing to take reasonable steps to teach petitioners to comprehend the symbols on the pages of those books is not equal treat-

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mately 28,000 children in the school year 1971-72 were not given the test because they speak, read, write and comprehend English with such severe difficulty, if at all, as to make the results meaningless." *Aspira of New York* v. *Board of Education of the City of New York,* 72 Civ. 4002, "Defendants' Answer to Complaint," February 9, 1973, Paragraph thirty-four.

ment as embodied in the Fourteenth Amendment.[11] On other occasions this Court has been presented with facially neutral action, and has not hesitated to invoke the prohibitions of the equal protection clause when such action particularly burdened a racial, national origin or ethnic group. Thus, in *Hunter* v. *Erikson*, 393 U.S. 385 (1969), this Court pierced a housing ordinance which appeared neutral but which, in reality, burdened minority groups in Akron, Ohio. The Court observed:

> Moreover, although the law on its face treats Negro and White, Jew and Gentile, in an identical manner, the reality is that the law's impact falls on the minority. *Id.* at 391.

In other instances, laws which apply to all in an identical manner were declared unconstitutional because of a disparate effect on individuals with different backgrounds and characteristics. For example, in *Douglas* v. *California*, 372 U.S. 353 (1963) the notion of equal justice for all persons, rich or poor, compelled this Court to declare unconstitutional a California rule of criminal procedure permitting the State to deny appointed counsel to indigents on appeal. There, Justice Douglas writing for a majority, stated:

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[11] The idea that children who come to school with different characteristics from the majority of a school population cannot be denied equal educational opportunity has been recognized in other fields. In *Pennsylvania Association for Retarded Children* v. *Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), mentally-retarded children plaintiffs were allegedly excluded from public school because of their retardation. After agreement had been reached between the parties, the Court approved a plan recognizing that "[i]t is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . ." *Id.* at 1260. See *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D. D.C. 1972).

> . . . [A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *Id.* at 356.

See, *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

More recently, in *Wisconsin* v. *Yoder*, 32 L. Ed.2d 15 (1972), the Court upheld the First Amendment right of Amish parents to the free exercise of religion, and declared the Wisconsin compulsory school attendance law to be an unconstitutional infringement of that right. In brushing aside the argument that the Wisconsin statute was neutral, applying to all alike, the Court stated:

> Nor can this case be disposed of on the grounds that Wisconsin's requirement for school attendance to age 16 applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. *Id.* at 28.[12]

[12] In other education cases, courts have applied equal protection analysis to strike down schemes facially and administratively neutral. Courts have held invalid the use of educational tests, geared toward white students which showed discriminatory results when given to children racially or ethnically different from the majority. *Hobson* v. *Hansen*, 269 F. Supp. 401 (D. D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *P.* v. *Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972). Additionally, Spanish speaking students have successfully attacked the discriminatory usage of tests written and administered in English. In *Diana* v.

And, Justice Stewart, concurring in *San Antonio Independent School District* v. *Rodriguez*, 41 U.S.L.W. 4407, 4425 (March 21, 1973), pointed out the unconstitutional ramifications of legislation which causes a discriminatory effect:

> Under the Equal Protection Clause, this presumption of constitutional validity disappears when a State has enacted legislation whose purpose *or effect* is to create classes based upon criteria that, in a constitutional sense are inherently "suspect." Because of the historic purpose of the Fourteenth Amendment, the prime example of such a "suspect" classification is one that is based upon race. (Emphasis added) (Citations omitted.)

For other discriminatory impact cases, see *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972);[13] *Kennedy Park*

State Board of Education, Civil Action No. C-7073 RFP (N.D. Cal. Feb. 2, 1970) and *Guadalupe Organization* v. *Tempe Elementary School District No. 3*, No. Civ. 71-435 (D. Ariz. Jan. 24, 1972), plaintiffs alleged improper classification as mentally retarded based on examinations conducted in English. As a result, Spanish speaking youngsters with normal or above normal intelligence were receiving the limited instruction offered the mentally retarded. In both cases, the parties reached agreements which were adopted as orders of the court alleviating the misclassifications.

[13] In *Chance* v. *Board of Examiners, supra*, a case in which civil service examinations which excluded Blacks and Puerto Ricans from principalships and assistant principalships in New York City schools were effectively challenged, the Second Circuit stated at 1175:

> [T]he district court found that the Board's examinations have a significant and substantial discriminatory impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug.

Homes Ass'n. v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied* 401 U.S. 1010 (1971); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968).[14]

Similarly, San Francisco's facially neutral educational procedures offend the constitutional requirement for equal educational opportunity, and unlawfully burden members of a particular racial and national origin group.

The Court of Appeals in *Lau* unsuccessfully attempts to distinguish *Douglas* and *Griffin*, on the theory that these decisions rest on the lack of a relationship between the ability to pay a fee and the purposes of criminal justice. *Lau* v. *Nichols*, *supra* at 916. However, the thrust of those cases was the unequal result produced by a seemingly neutral procedure. But even applying the Court of Appeals' interpretation of *Douglas* and *Griffin* to the facts of *Lau* would nonetheless mandate a reversal of the *Lau* decision. The Court of Appeals painstakingly details the importance of English in the United States:

> [T]he State's use of English as the language of instruction in its schools is intimately and properly related to the educational and socializing purposes for which public schools were established. This is an English-speaking nation. Knowledge of English is required to become a naturalized United States citizen, 8 U.S.C. §1423(1); likewise, California requires knowl-

[14] In *Norwalk CORE* v. *Norwalk Redevelopment Agency*, *supra*, the Court held that when an otherwise even-handed method of relocating persons by urban renewal has the effect of placing fewer members of the disadvantaged, the result was discriminatory and affirmative governmental action was necessary to rectify the wrong done.

> edge of the language for jury service, Cal. Code Civ. P. §198(2), (3). Similarly, an appreciation of English is essential to an understanding of legislative and judicial proceedings, and of the laws of the State, Cal. Const. art. IV, §24; Cal. Code Civ. P. §185, and of the nation. Use of English in the schools has this firm foundation, while the requirement of money payments in the criminal system does not.

Petitioners are demanding that they be given an opportunity to learn English. Amicus Curiae submits that given the importance of learning English as stated by the Court of Appeals, respondents' failure to take reasonable steps to teach petitioners English bears no relationship to the purpose of education—especially since educational instruction takes place in English.[15]

The Test to Be Applied Under the Equal Protection Clause

In cases involving national origin or racial discrimination, the disparity in treatment is subject to the strictest scrutiny. In *Korematsu* v. *United States*, *supra* at 216, a

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[15] In the criminal justice area, violations of due process have been cited when a defendant is forced to face procedures in a language he does not understand. The Second Circuit Court of Appeals in *U. S. Ex Rel. Negron* v. *State of New York*, 434 F.2d 386 (2d Cir. 1970), upheld the release of a defendant who spoke and understood only Spanish and thus was given no meaningful opportunity to participate in his trial. The Court stated:

> To Negron, most of the trial must have been a babble of voices . . . . '[R]egardless of the probabilities of his guilt, Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment.' *Id.* at 388-389.

Similarly, for petitioners, their classroom instruction is a "babble of voices".

Japanese relocation case, the Court began its analysis with the following warning:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . . It is to say that courts must subject them to the most rigid scrutiny.

See *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *McGowan* v. *Maryland*, 366 U.S. 420 (1961). The facts in *Lau* compel the application of the strictest scrutiny.

However, a violation of the equal protection clause is present whether or not a strict scrutiny standard is employed. Thus, the invidious classification perpetrated by the San Francisco school authorities cannot pass constitutional muster even under the rational basis test as enunciated in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972):

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, *but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Morey* v. *Doud*, 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U.S. 150 (1897); *Yick Wo* v. *Hopkins*, 113 U.S. 356 (1886). (Emphasis supplied.)

As Justice White recently wrote dissenting in *San Antonio Independent School District* v. *Rodriguez, supra* at 4427:

> Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, with-

> out also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.

The goal in the instant case is the education of children. The importance of that goal is well established. In *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954) the Court observed:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In *Wisconsin* v. *Yoder*, *supra* at 29, the Court reaffirmed this notion: "No one can question the State's duty to protect children from ignorance . . . . " Moreover, the Court recognized and accepted the close interrelationship between

education and the protection of fundamental rights and the performance of fundamental duties:[16]

> . . . [A]s Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions. *Id.*

Indeed, this Court has noted that at a minimum, a child's classroom education must include the learning of " . . . basic reading, writing, and elementary mathematics . . . " *Wisconsin* v. *Yoder, supra* at 23. By failing to teach petitioners the language of instruction, respondents have precluded petitioners from learning these critical skills. A system, such as San Francisco's, which effectively refuses to teach a portion of its students to read and write and otherwise communicate in English "results in the absolute deprivation of education." *San Antonio Independent School District* v. *Rodriguez, supra* at 4414.

Thus, it is difficult, if not impossible, to imagine any rational relationship between the educational goals of respondent San Francisco Unified School District, and its policy of denying substantial numbers of non-English speaking Chinese children assistance in learning the language of instruction.

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[16] The connection between a minimum of education and the full and effective exercise of the rights of citizenship is particularly applicable to Puerto Ricans, whether or not they speak English, since they are all United States citizens pursuant to the Jones Act, 48 U.S.C. §731 et seq. (1917).

POINT II

Respondents' Treatment of Petitioners Violates the Due Process Clause.

Respondents deny petitioners due process of law by compelling their attendance in school programs, which fail to provide any meaningful education to them.

Along with thousands of other school age children, petitioners are compelled by authority of law to attend classes in approved schools. Cal. Educ. Code §12101. This compulsion is backed by force of severe penalties. Cal. Educ. Code §12404. As most students, however, petitioners eagerly seek the benefits of education; but respondents fail to teach them the English language. Petitioners are thereby effectively excluded from reaping these benefits. The absence of effective education concerning petitioners is the *de facto* equivalent of the "absolute deprivation" of education which the Court alluded to in *San Antonio Independent School District* v. *Rodriguez, supra* at 4414. Consequently, the San Francisco school system fails to provide non-English speaking petitioners "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights to speech and of full participation in the political process." *Id.* at 4418. Such a system is patently arbitrary and capricious and courts have struck down similar governmental schemes which force persons, under penalty of law, into institutions which are created for, but in fact, do not benefit them.

In *Mills* v. *Board of Education of the District of Columbia, supra* at 874, a due process case, the Court observed:

". . . [R]equiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children."

In other contexts in which the state presumes to exercise beneficient control over children, the courts have made certain that the benign purpose was in fact being carried out. See, *In Re Gault*, 387 U.S. 1, 22 n. 30 (1967) where the Court stated:

> . . . to the extent that . . . special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo*.

In *Inmates of Boys' Training School* v. *Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) the Court found violations of the due process clause in the failure of the State to provide rehabilitative programs to its juvenile inmates. Among the anti-rehabilitative conditions which led the Court to its finding was the failure of the defendants to provide adequate education to the inmates. The Court noted: "As to education, there is a bitterly cruel irony in removing a boy from his parents because he is a truant from school and then confining him . . . where he gets no education." *Id.* at 1369. The irony is no less cruel and no less violative of due process in the instant case, where petitioners regularly attend schools at the command of the State, but are denied the benefits of education. See *Martarella* v. *Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), where the Court found due process violations in the failure to treat children in New York detention centers.

Cases such as *Martarella* and *Inmates of Boys' Training School* which concern the custodial treatment of children are representative of the expanding number of cases which find due process violations when the "right to treatment" is denied. Perhaps the clearest statement of the right is Judge Johnson's in *Wyatt* v. *Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971): "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." *Wyatt* v. *Stickney, supra,* concerned the failure to treat involuntarily committed patients in state mental hospitals. See, *Rouse* v. *Cameron*, 373 F.2d 451 (D.C. Cir. 1966). The similarity of the predicaments of the untreated mental patients and these petitioners—both forced to sit by, day after day, without receiving the benefit upon which their institutional presence is predicated—is manifest.

Here, petitioners do not attack required school attendance. On the contrary, they challenge respondents' failure to institute a system which provides them with the most basic requirement for learning—an understanding of the medium of instruction. In light of respondents' failure, petitioners' right to due process of law has been violated.

CONCLUSION

Because the treatment of petitioners violates both the equal protection and due process guarantees of the Fourteenth Amendment, and because the opinion of the Court of Appeals is contrary to the weight of authority, this Court should reverse its judgment in all respects.

Respectfully submitted,

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